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No. 97-0472

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

BILL JONES, SECRETARY OF STATE OF CALIFORNIA,

Petitioner,

v.

BATES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari (or in the Alternative Writs of Prohibition and Mandamus) to the United States Court of Appeals for the Ninth Circuit

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OPPOSITION TO MOTION TO EXPEDITE BRIEFING AND CONSIDERATION OF THE PETITION FOR A WRIT OF CERTIORARI OR FOR WRITS OF PROHIBITION AND MANDAMUS, AND TO ADVANCE BRIEFING AND ORAL ARGUMENT ON THE MERITS

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OPPOSITION TO MOTION TO EXPEDITE BRIEFING AND CONSIDERATION OF THE PETITION FOR A WRIT OF CERTIORARI OR FOR WRITS OF PROHIBITION AND MANDAMUS, AND TO ADVANCE BRIEFING AND ORAL ARGUMENT ON THE MERITS

California's Secretary of State has obviously decided that his cause is lost, at least in the Ninth Circuit. His response to that assumption is to advise this Court that a loss is "virtually certain" there, to attack judges personally, to invent federal-state conflicts that do not exist, and to ask this Court to take from the Ninth Circuit a case that has been fully briefed and argued. He cites no case, nor have respondents been able to find one, in which this Court has taken the pen from the hands of a circuit court even as it crafted its decision. The only expedited consideration that this Court should give to the petition is to deny it promptly.

I. THE PURPORTED CONFLICT WITH THE STATE COURTS IS WISHFUL THINKING ON THE SECRETARY'S PART

After a two-week trial, the district court declared that California's lifetime ban on service in the state Senate after two four-year terms and in the state Assembly after three two-year terms violates the First and Fourteenth Amendments to the United States Constitution. In reaching this conclusion, the district court accepted, as it must, the California Supreme Court's construction that Proposition 140 imposes a lifetime ban on further service. Appendix to Petition for a Writ of Certiorari ("App.") 16a; *see Legislature v. Eu*, 54 Cal.3d 492, 503-06, 816 P.2d 1309, 1314-16 (1991), *cert. denied*, 503 U.S. 919 (1992). California is one of only seven states (of the twenty-one that

impose state legislative term limits) to impose a lifetime ban on further service. App. 12a-13a.

The trial judge made factual findings that have nothing to do with the local term limits or executive term limits cited by petitioners and everything to do with California's legislative term limits. After hearing substantial evidence, she found that in California the lifetime ban -- and its absolute bar to candidacy -- is not narrowly tailored to serve the interests articulated by defendants. Among other evidence, the trial court had before it the admission of defendants' only expert witness that he did not believe that a lifetime ban was necessary to achieve the purposes of term limits. District Court Transcript 688:17-21 and 690:4-19. Even the Secretary of State's predecessor conceded in *Legislature v. Eu* that "a lifetime ban on candidacy is not essential to accomplish the voters' purpose of preventing the development of an entrenched and self-perpetuating political machine in the Legislature . . . ."[1]

The Secretary of State appealed, and in response to the Ninth Circuit's inquiry about the date by which candidates would need to know whether Proposition 140 bars them from seeking office, the Secretary of State advised the court that in the event of an affirmance, he would only consider himself bound by the district court's declaratory judgment with respect to the

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[1] Brief of Respondent March Fong Eu at 25, Exhibit G to Declaration of Joseph Remcho in Support of Motion to Vacate Stay, filed with the Ninth Circuit in Appeal No. 15864.

three named plaintiff legislators and the named plaintiff voters. App. 53a. Recognizing that the Secretary of State's position created the potential for disruption to the 1998 elections, the Ninth Circuit invited legislators and voters to file motions to intervene to avoid uncertainty. App. 57a-59a.

Now, the Secretary of State is attempting to use an issue that he created to convince this Court to grant certiorari before judgment. The purported federal-state conflict that drives the Secretary's breathless petition has no more validity than the res judicata claim that the Secretary made below and now abandons in this Court. The facts are these.

In 1991, the California Supreme Court reviewed and rejected an array of challenges to Proposition 140 based largely on state law. *Legislature v. Eu,* 54 Cal.3d 492, 816 P.2d 1309 (1991). Among the issues in that case was a claim by certain legislators and voters that Proposition 140's lifetime term limits violate the First and Fourteenth Amendments. 54 Cal.3d at 514, 816 P.2d at 1322. In rejecting the First Amendment claim, however, the California Supreme Court acknowledged that "it is presently unclear under federal law whether and to what extent voters retain a constitutional right to vote for particular candidates such as the incumbent legislators affected by the challenged measure." 54 Cal. 3d at 519, 816 P.2d at 1325. The state court concluded that under federal law, "the *legal* impact of Proposition 140 on the voters remains uncertain." *Id.* (emphasis added). Nonetheless, it had to decide the case, and it did so.

Two things have happened since the California Supreme Court made that statement in *Legislature v. Eu*. First, this Court clarified the standards for weighing the impact of a burden on the rights to vote and to be a candidate against the state's need to control its elections. In *Burdick v. Takushi*, 504 U.S. 428 (1992), the Court held:

> the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance."
>
> *Id.* at 434, quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992).

Second, in *U. S. Term Limits v. Thornton*, the Court made clear that term limits do place severe restrictions upon the right to vote, calling them "contrary to the 'fundamental principle of our representative democracy,' embodied in the Constitution, 'that the people should choose whom they please to govern them.'" *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 115 S. Ct. 1842, 1862 (1995), quoting *Powell v. McCormack*, 395 U.S. 486, 547 (1969). Unlike the California Supreme Court, which acknowledged the uncertainty in the law, the Ninth Circuit will have the guidance of this Court's decisions in *Burdick* and *Thornton* when it reviews the district court's judgment that California's lifetime limits are not narrowly tailored.

The Secretary of State nonetheless argues that an affirmance by the Ninth Circuit will create a conflict with the California Supreme Court because of *Legislature v. Eu*. That argument, however, confuses the general proposition that state courts are not bound by a lower federal court's interpretation of the federal Constitution with the specific case of a statute that has been declared unconstitutional by the federal courts after further development of the law. In that situation, there is simply no basis to assume that any court, whether state or federal, would refuse to honor a ruling by the Ninth Circuit that California's term limits are unconstitutional. Like the judgment below, the Ninth Circuit's ruling -- regardless of the outcome -- will include consideration of important precedent by this Court that post-dates the California case.

Thus, the potential for a conflict between the state and federal courts, which the Secretary of State deems "imminent,"[2] is unlikely to materialize. Even if this situation were to arise, nothing the Ninth Circuit has done would prevent this Court from exercising its authority to resolve a conflict between the state and federal courts. In any event, none of this will come to pass if the Ninth Circuit reverses the district court.

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[2] Petition for Writ of Certiorari at 1, 19.

II. THIS CASE DOES NOT JUSTIFY DEVIATION FROM NORMAL APPELLATE PRACTICE

The exercise of the Supreme Court's power to grant certiorari before judgment is "an extremely rare occurrence." *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., as Circuit Justice). This Court has exercised such authority only in cases of national emergency. *See, e.g., Mistretta v. United States*, 488 U.S. 361 (1989) [constitutionality of Sentencing Guidelines], *Dames & Moore v. Regan*, 453 U.S. 654 (1981) [Iranian hostage settlement], *United States v. Nixon*, 418 U.S. 683 (1974) [Nixon tapes], *United States v. United Mine Workers*, 330 U.S. 258 (1947) [nationwide coal strike], *Ex parte Quirin*, 317 U.S. 1 (1942) [wartime court martial of enemy saboteurs].[3]

Petitioner offers two grounds for the extraordinary and unprecedented relief he seeks. First, the Secretary of State argues that the Ninth Circuit erred by inviting legislators and voters to file motions to intervene in the case after he suggested that an affirmance of the district court's declaratory judgment would apply only to the named plaintiffs, three legislators

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[3] The Court has also exercised this power in situations where the same issue is already pending before the Court in another case and where simultaneous review of the action pending in the Court of Appeals is desirable. *See, e.g., Brown v. Board of Education*, 344 U.S. 1, 3 (1952) (per curiam) [Court invited the filing of petition for certiorari before judgment in case then pending in Court of Appeals for the District of Columbia to consider constitutional issues similar to those in *Brown*, which was then pending before the Court], *Taylor v. McElroy*, 360 U.S. 709 (1959) (per curiam) [Court granted certiorari before judgment because of pendency of case involving the same constitutional issues]. This is not such a case.

and twelve voters who support them. The Secretary of States's opposition to the motions for intervention is due on Tuesday, September 23rd, and the Court of Appeals has not yet ruled on the motions. The Ninth Circuit's effort to minimize electoral confusion was clearly appropriate, but any error, either in the Court of Appeals' invitation to file motions to intervene or in its ultimate ruling on the motions, can be handled through the normal appellate channels. There is no cause for deviation from those procedures in this case.

The Secretary of State argues that the urgency of this matter requires swift review by this Court, but the Ninth Circuit has clearly recognized the time sensitivity of this case and has acted accordingly. First, the court *sua sponte* consolidated plaintiffs' appeal of the district court's stay order and separate motion to lift the stay[4] with defendants' appeal on the merits. In the same order, the court expedited briefing and argument of the case, setting it even earlier than the parties had suggested,

> [b]ecause the public has an interest in the speediest possible resolution of this dispute and the court desires to act, if possible, in a manner that will permit all concerned to conduct themselves in a fully informed manner with respect to the 1998 elections . . . .
>
> App. 49a.

[4] The district court declared that California's term limits were unconstitutional and enjoined enforcement as to the named plaintiffs, but stayed its injunction pending review in the Ninth Circuit. App. 47a.

After oral argument on August 6, 1997, the court requested that the parties advise it of the date by which candidates must be advised whether California's lifetime legislative term limits are valid. App. 50a. The Court of Appeals requested further post-argument briefing on August 19, 1997. App. 54a-56a. And on September 2, 1997, in response to the Secretary's letter brief, the court invited non-plaintiff legislators and voters to file motions to intervene and asked for briefing on the propriety of intervention. App. 57a-59a. It is obviously moving swiftly.

In denying a petition for certiorari before judgment in *Aaron v. Cooper*, 357 U.S. 566 (1958), the Little Rock integration case, this Court noted:

> We have no doubt that the Court of Appeals will recognize the vital importance of the time element in this litigation, and that it will act upon . . . the appeal in ample time to permit arrangements to be made for the next school year.

Id. at 567.

Here, the record demonstrates that the Ninth Circuit recognizes "the vital importance of the time element in this litigation" and is acting promptly. As in *Aaron v. Cooper*, there is no cause for the Court to intercede.

CONCLUSION

The Secretary of State's petition for writ of certiorari prior to judgment is a desperate attempt to avoid what the Secretary now believes will be a losing appeal. Regardless of the post-judgment merits of the questions presented by the Secretary of State, review at this time is unnecessary and

inappropriate. There is no national emergency that would justify deviation from standard appellate practice, and any claims of error during the course of the appellate process can be brought to this Court's attention after judgment by the Ninth Circuit. Unless the Court specifically desires a formal response, respondents do not intend to submit an opposition to the petition. The Motion to Expedite and the Petition for A Writ of Certiorari, or Writs of Prohibition or Mandamus should be promptly denied.

Dated: September 19, 1997

Respectfully submitted,

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